In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-18

JOHN R. ENGLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 458 F.2d 1017.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1972 (Pet. App. 1). On May 24, 1972, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July

1, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the proof and the offense charged in the indictment.

2. Whether the use of the term "kickback" by a government witness resulted in the denial of a fair trial.

3. Whether evidence concerning oral statements given by petitioner to a special agent of the Internal Revenue Service in a non-coercive and non-custodial interview should have been suppressed because the agent did not give full *Miranda* warnings concerning petitioner's constitutional rights.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) *Declarations under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

* * * * *

shall be guilty of a felony * * *.

STATEMENT

A three-count indictment (Pet. App. 13-14) charged that petitioner had willfully and knowingly filed joint federal income tax returns for the years 1965, 1966 and 1967 which he did not believe to be true, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.), in that the return reported as "total income" an amount less than his actual total income. A jury convicted petitioner on all counts (Pet. App. 1), and the court of appeals affirmed (Pet. App. 1-8).

The evidence was in substance as follows: Petitioner, during the years involved, was president of a corporation (Steak N' Shake) which operated about 75 drive-in restaurants, about 20 of which were in the St. Louis, Missouri area. In the latter restaurants, the corporation permitted American Cigarette Vending Company ("American Vending") to maintain cigarette vending machines in return for monthly payments, duly recorded on the books of both companies, at the rate of about three cents for each package of cigarettes sold. During these years petitioner personally received payments from American Vending each month in the form of cash in an envelope. These payments, during the years here involved, were at the rate of one and one-half cents for each package of cigarettes sold, and amounted to $3,897.48 in 1965, $4,400.09 in 1966, and $2,119 in 1967—amounts which were precisely the same as the amounts alleged in the indictment as understate-

ments of income (Pet. App. 2-3, 13-14; R. 144-145).[1] Petitioner conceded that none of the payments thus received were reported on his income tax returns. (R. 212-213; Pet. App. 3.) The returns were prepared by Mr. Roark, who was treasurer of Steak 'N Shake, but petitioner did not inform Mr. Roark of the payments because "I didn't think it was any of his business" (R. 189).

Petitioner testified that, although he kept no records (R. 148), he spent all the payments in buying dinners and drinks and otherwise entertaining the employees of Steak N' Shake and that he was not reimbursed for these expenditures (R. 137-188). He had an expense account and received monthly reimbursements from the corporation of about $14,000 per year (R. 194-200). These reimbursed expenses included dinners and drinks for the corporation's employees (R. 210-212). Petitioner testified, however, that he obtained reimbursement only when he entered an expenditure in his expense book (R. 174).

Petitioner testified that this use of cash received from American Vending began in the early 1950's, when the previous president of the corporation (Gus Belt) told him that he (petitioner) was spending more than he was being reimbursed and should have "part of the sales from the cigarettes" (R. 144). Mr. O'Shea, of American Vending, agreed to make the payments (R. 144). The alleged purpose of this arrangement was to prevent a certain Mr. Smith, now deceased, from knowing the full extent of the enter-

[1] "R." refers to the appendix filed in the court of appeals.

tainment expenses, although they were, in petitioner's opinion, for the good of the company (R. 137-142). Mr. Belt was the founder of the company and, together with his family, was the majority stockholder; Mr. Smith was a minority stockholder (R. 192). Roark, the treasurer, never questioned any of petitioner's expense accounts and always paid the amounts involved (R. 218-219).

Steak 'N Shake had gross sales of $22,000,000 in 1970, including $9,000,000 in the St. Louis area (R. 193-194). Before Mr. O'Shea died in 1958, petitioned picked up the cash payments at a tavern (R. 73, 148-149). Later, after Mrs. Cronin became president of American Vending, petitioner went to her place of business and told her that he wanted "a cent and a half a pack on the commission on the cigarettes" (R. 56-58). She acquiesced (R. 58).

ARGUMENT

1. Petitioner's contention (Pet. 7-14) that there was a fatal variance between the indictment and the proof is based on petitioner's unwarranted assumption that the references in the indictment to an understatement of "total income" (Pet. App. 13-14), are to page one, line 9, of each return, where total income, for computation purposes, has a more restricted meaning than in its ordinary sense. At page one, line 9, "total income" is a figure comprised of, *inter alia*, wages, salary, and "other income" (R. 324, 327, 330; Pet. App. 9). The "other income" can be a net figure brought forward from elsewhere in the return, thus

excluding income required to be listed elsewhere on the form. Thus, a taxpayer might have business income or miscellaneous income, required to be reported elsewhere, which might be completely offset by allowable business expenses, leaving nothing to be brought forward to page one and thus not being shown on page one, line 9.

The flaw in petitioner's contention, as the court of appeals observed (Pet. App. 4), is that the indictment makes no reference to page one, line 9. The ordinary meaning of "total income" is the same as total receipts or gross income, which includes income against which other deductions are claimed. The fact that "total income" may have a different meaning on page one of the return does not demonstrate that petitioner was misled as to what this quite simple indictment charged, *i.e.*, that we had knowingly failed to report some of his income. Cf. *Berger* v. *United States*, 295 U.S. 78, 82.

If petitioner had any doubt as to what items comprised the alleged understatement of total income, he could have had the matter clarified by requesting a bill of particulars. In fact, petitioner knew exactly what the government's proof would be, since he had discussed with Special Agent Lewis the fact that he had received the cash payments in question but had not reported them in his income tax returns (R. 110-111).

Furthermore, petitioner never challenged the sufficiency of the indictment until after the trial. "An indictment will be construed liberally in favor of its

sufficiency where objection to it is first made after verdict or judgment." *United States* v. *Norman*, 391 F.2d 212, 213 (C.A. 6), certiorari denied, 390 U.S. 1014. "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." *Hagner* v. *United States*, 285 U.S. 427, 433.

Petitioner contends (Pet. 13-14) that he was deprived of the "defense" (Pet. 13) of showing that he used all the money in question in the form of allowable business expenses. It is no defense to a charge under Section 7206(1) to prove that, although petitioner failed to report his receipts from American Vending, he would have owed no greater tax if he had done so, because he could have offset the receipts with allowable expenses which he also failed to claim. See *Gaunt* v. *United States*, 184 F.2d 284, 288 (C.A. 1), certiorari denied, 340 U.S. 917; *Siravo* v. *United States*, 377 F.2d 469, 472-473 (C.A. 1). Cf. *Sansone* v. *United States*, 380 U.S. 343, 352, involving identical considerations under Section 7207 of the Code where, as here, an underpayment of tax or an intent to defeat a tax is not an element of the offense.[2]

2. Petitioner argues (Pet. 14-15) that he was denied a fair trial because of Special Agent Lewis' use of the word "kickback" (R. 114) in testifying before the jury. As the court of appeals suggested

[2] The reason for this rule is that where nothing is reported, the Commissioner is not even apprised of the need to verify or to investigate.

(Pet. App. 6), that term aptly described the cash payments here involved, and its use was inconsequential in any event, since the jury knew the undisputed facts concerning the payments. Furthermore, any possible prejudice to petitioner's case was cured by the trial court's prompt instruction striking the answer and directing the jury to disregard it. (R. 117.)

3. Petitioner contends (Pet. 15-16) that his statements when he was interviewed by Special Agent Lewis (R. 110-112) should have been suppressed, either because the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, were not given or because the agent allegedly did not give the type of warning required by Internal Revenue Service directives (Pet. App. 25-26). The agent informed petitioner as required by the directives (Pet. App. 25-26) that it was his function to investigate criminal tax fraud (R. 108-109). Since the occasion was the agents "initial contact" with petitioner he fully satisfied the directive (Pet. App. 25). As to *Miranda* warnings, the other courts of appeals have held that no *Miranda* warning is required in a case such as this where the taxpayer has not been deprived of his freedom of action in any significant way. This Court has consistently refused to grant certiorari on this issue.[3]

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[3] In *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7) the Seventh Circuit required that special agents of the Internal Revenue Service give *Miranda* warnings at the outset of any investigation despite the absence of any form of cus-

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1972.

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tody, because the taxpayer might be unaware of the possible criminal implication of the inquiry. The other circuits have held to the contrary. *E.g., United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417-420 (C.A. 3), certiorari denied, 400 U.S. 1021; *United States* v. *Prudden*, 424 F. 2d 1021, 1025-1031 (C.A. 5), certiorari denied, 400 U.S. 831; *United States* v. *Mariani*, 422 F. 2d 150, 153-154 (C.A. 6), certiorari denied, 399 U.S. 910; *United States* v. *MacLeod*, 436 F. 2d 947 (C.A. 8), certiorari denied, 402 U.S. 907. Moreover, in the present case the agent did make known that it was his function to investigate criminal tax fraud.

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